IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DOROTHY BULLITT, an individual person, Appellant, v. YALE LEWIS and KATHERINE HENDRICKS, husband and wife, and the marital community comprised thereof, Respondents.	)	No. 56666-1-I **DIVISION ONE** UNPUBLISHED OPINION FILED: September 5, 2006

APPELWICK, C.J. — Dorothy Bullitt appeals the trial court's grant of summary judgment to respondents. Bullitt claimed that she slipped on ice on the sidewalk in front of respondents' driveway. She asserted that the ice was caused by snow respondents had shoveled from the driveway and corresponding sidewalk that had melted and refrozen. Bullitt never saw or felt the ice she allegedly slipped on. The trial court held that there was insufficient evidence that Bullitt had slipped on ice, and that respondents owed no duty to keep the sidewalk free of ice. We agree that Bullitt did not present sufficient evidence that ice caused her fall. We also reverse the trial court's denial of

costs and remand for a determination of allowable costs.

FACTS

On February 17, 2001, Dorothy Bullitt slipped and fell on the sidewalk as she crossed Yale Lewis's and Katherine Hendricks's (respondents') driveway. It had snowed in Seattle a day or two before, and Hendricks and her children had shoveled the driveway and the corresponding part of the sidewalk clear of snow on February 16. Hendricks and her children had piled the shoveled snow to the side of driveway. Bullitt slipped just as she stepped from the snowy part of the sidewalk to the shoveled part, fell, and rolled onto the parking strip.

The driveway had appeared "perfectly clear" as Bullitt approached it, and as she lay on the ground, she "was unable to detect ice" where she fell. She did see some glinting further up the sides of the driveway where the sun was shining. She saw the small piles of snow next to the driveway, and inferred that some of the snow piles had melted down to the sidewalk and refrozen, and that she had slipped on ice formed from that melting and refreezing. She did not run her hand over the surface on which she fell to see if it was icy. After about 20 to 40 minutes, some pedestrians came along and helped Bullitt get to the hospital. Bullitt's fall broke her right arm and right leg in numerous places. She has since had several surgeries.

In February 2004, Bullitt sued respondents, alleging they had created a hazard by altering natural conditions. After the parties deposed each other, respondents moved for summary judgment. Bullitt submitted a declaration of

Daniel Johnson, a professional ergonomist. In June 2004, Johnson examined the area where Bullitt fell and determined that the area was slip-resistant both when dry and when wet.

The trial court granted the respondents' motion for summary judgment, but specifically crossed out language granting respondents their costs. The trial court apparently orally informed respondents that it denied costs because respondents had not requested costs in their summary judgment motion.

Bullitt moved for reconsideration. The trial court denied Bullitt's motion, stating:

> there is insufficient evidence in the record to conclude that Plaintiff slipped on ice created by snow from Defendant's driveway. However, even if this court accepts Plaintiff's rendition of the facts, the court grants summary judgment on the basis that there was no legal duty to keep the public sidewalk clear of ice after Defendants cleared their driveway of snow. The law does not require Defendants to undertake remedial measures when the snow melts from their driveway onto the public sidewalk used by Plaintiff.

Bullitt appeals. Respondents cross-appeal the court's refusal to grant them costs.

ANALYSIS

I. Evidence of Slipping on Ice

Respondents contend that Bullitt's statements as to what happened to her on the day of the accident are "purely conclusory statements of fact that are insufficient to raise a genuine issue of fact." Respondents assert that because Bullitt stated in her deposition that she saw only a smooth, clear surface and was

unable to detect ice even after she fell, she has submitted only conclusory facts. Respondents suggest Bullitt could easily have fallen on something other than ice, or that even if she did fall on ice, the ice could have come from some other source.

Summary judgment is appropriate if there is no genuine issue of material fact or if the plaintiff cannot make a prima facie showing of each of the elements of his or her claim. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The court must consider all facts and reasonable inferences in the light most favorable to the nonmoving party. Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). However, "if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover**,** a jury will not be permitted to conjecture how the accident occurred." Gardner v. Seymour, 27 Wn.2d 802, 809, 180 P.2d 564 (1947). The plaintiff must show that there is room for those "of reasonable minds to conclude that there is a greater probability that the accident happened in such a way that the trier of fact could determine the respondent to be negligent than there is that it did not so happen." Stevens v. State, 4 Wn. App. 814, 817, 484 P.2d 467 (1971).

Bullitt's claim fails because, viewing all of the facts and the reasonable inferences therefrom in the light most favorable to her, she has not shown a greater probability that she slipped on ice and that the ice was the result of

melted snow from the respondents' driveway. Bullitt testified in her deposition that when she looked at the driveway:

> I observed what continued to appear a totally clear surface. I couldn't—The sun had stopped shining, so there was no light flickering on it. I was unable to detect ice. I mean, I knew there was ice because I just slipped so violently, but it still looked perfectly clear, perfectly smooth. I saw no evidence of gravel or salt or any, any texture whatsoever.

She further elaborated:

> There was some sun glinting on the driveway itself, on the edges of the driveway. This—Down along the side I did see ice glinting, but the sun was hitting on that. It was not hitting on this. So, I, as I lay there, I inferred that the—that water had, had slid—There had been some melting or—There's underground water in that area as well that had come down the side here and had, had altered the—I don't know about the rest of the driveway. I mean, I just—But this little side part, that's where I saw the sparkling.

Bullitt testified that she did not run her hand over the surface where she fell.

This testimony is insufficient to establish a prima facie case that Bullitt slipped on ice. Bullitt did not see ice where she fell. She testified that she inferred that she slipped on ice, based on the violence of the fall and the fact that she saw some glinting further up the driveway. But Bullitt might have slipped due to snow dislodging from her boot when it hit the sidewalk, or due to snow on the sole of her boot coming into contact with the sidewalk. The only evidence supporting Bullitt's conclusion that she slipped on ice was the glinting she saw on the driveway. But this glinting could have been either ice or water, and Bullitt could not testify that there was also glinting where she fell. There was also no evidence as to the condition of the sidewalk from the people who

had helped Bullitt get off the ground. Further, Hendricks said that earlier that morning she walked on the driveway and sidewalk "without difficulty." Rational inferences from this evidence do not establish a prima facie case that Bullitt slipped on ice—they merely suggest a conjectural theory, which is insufficient.

The fact that Bullitt submitted a declaration from Johnson, a professional ergonomist, does not alter this conclusion. Johnson examined the area of the fall in June 2004, and reviewed Bullitt's deposition. He stated that the sidewalk was slip–resistant when dry and when wetted with water. His opinion was that clear ice was present on the sidewalk that day. He further testified that:

> By clearing the snow to the sides of the driveway, which slopes down toward the sidewalk, it is likely that as the snow melted water flowed down to the cleared sidewalk where it refroze.. . . This slip and fall occurred because snow was piled along the sides of the driveway such that when it melted it flowed down to the sidewalk below where it refroze into a clear, highly slippery surface undetectable to pedestrians.

Johnson's declaration does not elevate Bullitt's inference that she slipped on ice to the level of a prima facie case. All that the declaration establishes is that the sidewalk was not slippery when dry or wet. But Johnson does not address whether any other substance could have caused Bullitt's fall, such as snow lodged in or dislodged from her boot.

Bullitt cites Johnson v. City of Ilwaco, 38 Wn.2d 408, 229 P.2d 878 (1951), to support her contention that she produced sufficient evidence. In Johnson, the plaintiff alleged that she tripped and fell on a raised offset portion of a sidewalk and a hole in the sidewalk for a flagpole. Johnson, 38 Wn.2d at

410. The city argued that any relation between her fall and the offset and hole was conjecture. Johnson, 38 Wn.2d at 414. The court noted the testimony of a witness who saw her fall, and concluded:

> No claim is made that the sidewalk was slippery. There was claimed but one cause of appellant falling. The jury had the right to accept or reject the evidence in relation thereto. There was no occasion for speculation. Respondent also urges, in this connection, there was no substantial evidence that the flag pole hole near the curb had anything to do with appellant continuing to fall after turning her ankle when she stepped on the offset, and to connect the two factors one must further indulge in speculation. The testimony of appellant was to the effect that when she lost her balance by stepping on the offset she attempted to regain it, and in so doing the heel of her shoe caught in the hole. The jury had the right to infer and conclude that the combination of the offset and the flag pole hole caused appellant to lose her balance and fall.

Johnson, 38 Wn.2d at 415.

Johnson is distinguishable because in that case, there was no dispute as to the existence of the offset or the hole. Based on the plaintiff's description of how she lost her balance and then had her heel caught, in addition to the testimony of a witness who saw her fall, the jury was not forced to speculate as to the cause of her injury. But here, it is unclear whether ice was even present on the surface on which Bullitt slipped. Bullitt did not see or feel ice below her. Bullitt's conclusion that she slipped on ice was conjectural. Because we affirm the trial court on this ground, we need not consider the issue of whether respondents breached any duty of care.

II. Respondents' Costs

Respondents argue that the trial court erred in not awarding them costs.

They contend that, contrary to what the trial court held, the prevailing party does not have to request costs by motion. Bullitt does not contest respondents' claim.

Respondents are correct. "The allowance of costs . . . is governed by statute. A prayer for them is unnecessary." Lujan v. Santoya, 41 Wn.2d 499, 501, 250 P.2d 543 (1952) (citing RCW 4.84.010 and .030). The prevailing party in superior court is entitled to costs. RCW 4.84.030. We remand for the trial court to determine respondents' allowable costs.

We reverse and remand for determination of costs, and affirm on all other issues.

Appelwick, C.J.

WE CONCUR:

Cox, J.

Becker, J.